

No. 15964

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles
and Dan O. Hoye,

Appellant,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL,
Director of Internal Revenue,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

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Director of Internal Revenue,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

Appellees' Statement of the Case.

The appellees erroneously construe the appellant's complaint by asserting (Br. p. 5) that the sole reason for the appellant's admitted failure to turn over any of the sum levied upon is that the United States had not complied with the requirements of Section 710 of the California Code of Civil Procedure.

The question of the proper parties to whom such payment should be made, the appellant's inability to discharge his duty as a public official by such payment, and the fact that such payment would not exonerate the appellant from personal liability for the sum paid over, are additional reasons alleged in paragraph VI of the complaint [Tr. p. 6] and form further bases for the appellant's contention

that the District Court had jurisdiction of his action. These allegations likewise negative the appellees' assertion that no question of liability of the controller to third persons is presented (Br. p. 9). While it is true that the argument as to the probable identity of such persons was not pressed in the District Court, that issue is clearly framed by the pleadings and is not a matter raised for the first time upon this appeal as contended by the appellees. In any event, where injustice might otherwise result, an appellate court may consider questions of law which were neither pressed nor passed upon by the court or administrative agency below (*Hormel v. Helvering*, 312 U. S. 552, 557, 61 S. Ct. 719, 721, 85 L. Ed. 1037).

The District Court Has Jurisdiction Under the Declaratory Judgments Act and Under 28 U. S. C., Section 2463.

The appellees concede that the District Court would have jurisdiction of an action under the Declaratory Judgments Acts (28 U. S. C., Sec. 2201) where a suit was brought by a person claiming ownership of the property levied upon which was threatened by imminent sale or distraint by the United States for the tax obligations of another (Br. p. 18). The appellees then attempt to distinguish the appellant's situation by contending that his action was not to protect any property interest of the appellant in the debt owing by the city to the taxpayer. This analysis overlooks the substance of the matter, however, for if the appellant controller is not exonerated from personal liability upon turning over to the government the property levied upon then it follows that upon the event of the imposition of such personal liability, his property is effectively taken to satisfy the tax obligations

of another. Under these circumstances, the government is merely attempting to do indirectly that which it cannot do directly.

The same reasoning supports the appellant's position that jurisdiction of the District Court also exists pursuant to 28 U. S. C., Section 2463.

The Order of the District Court Is a Final Decision and Appealable Under 28 U. S. C., Section 1291.

The appellees' contention as to the non-appealability of the order dismissing the appellant's complaint is bottomed upon the premise that appellant Hoyer is in no way prejudiced by such order since the issues raised in his action are still pending in the government's suit in intervention (Br. pp. 12-15). This position overlooks, however, the fundamental fact that if appellant Hoyer was entitled to have the levy and final demand quashed he could not then be subjected to the necessity of defending a punitive action based upon Section 6332 of the Internal Revenue Code of 1954 wherein the government would seek to impose personal liability upon him. The District Court in dismissing the appellant's action thrust this very situation upon the appellant by permitting the government's suit in intervention in which the first cause of action is so based. Obviously, but for the first cause of action, the appellant would have no quarrel with the suit in intervention since the matter then is merely one based upon the second cause of action for the foreclosure of a tax lien in which his personal liability is not involved. Additionally, assuming a judgment upon this second cause of action favorable to the government, a situation is presented whereby there would be substantial compliance with the provisions of Section 710 of the California Code of Civil

Procedure so that payment by Hoyer to the government in accordance with such judgment would exonerate him from any personal liability thereafter. To say that Rule 54(b) of the Federal Rules of Civil Procedure authorizes a procedural device whereby the appellant's rights may be short-circuited as has been done in this case is to ignore the fundamental purpose of those rules to serve the interests of justice rather than form.

Conclusion.

The order of the District Court dismissing the appellant's action should be reversed.

Respectfully submitted,

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